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IN THE

Supreme Court of the United States

October Term, 1962

No. [redacted] 1571

BANKERS TRUST COMPANY and LEONARD M. WALLSTEIN, as Executors of the Will of CHARLES NEWMAN, Deceased,

Petitioners,

—vs—

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

LEONARD M. WALLSTEIN, JR.
Attorney for Petitioners
233 Broadway
New York 7, N. Y.

LEONARD M. WALLSTEIN
BENJAMIN MENSCHEL
Of Counsel

SUBJECT INDEX

	PAGE
Preliminary Statement	1
I. Reports of the opinions of the courts below	2
II. Date of judgment sought to be reviewed	2
III. This Court's jurisdiction	2
IV. The questions presented for review	2
V. The Statute and Treasury Regulation Involved	3
Revenue Ruling 59-143 also involved	4
VI. The jurisdiction of the District Court	5
VII. The facts material to the consideration of the questions	5
VIII. The reasons for the allowance of the writ:	8
A. The specific question has not been but should be settled by this Court	8
B. The issue is one of wide public interest	8
C. The decisions below misconceived— *Commissioner* v. *Estate of Sternberger*, 348 U. S. 187 (1954)	8
and are in conflict with the Court of Appeals of the First Circuit	9
(1) The misconception that *Sternberger* requires *certainty* that charity will take	9
(2) The conflict of that decision with the First Circuit	11
(3) The misconception as to the sufficiency of statistics	12

PAGE

(4) Conflict upon that point with the First Circuit 15

(5) The misconception as to the effect of volition 15

(6) The misconception and conflict with the First Circuit as to the effect of the administrative decision here 16

Conclusion 17

Opinion of the Court of Appeals—Appendix A 19

CITATIONS

Cases

Bankers Trust Co. v. U. S., 190 F. Supp. 671 (1960) 2

Bankers Trust Co. v. U. S., 191 F. Supp. 792 (1961) 2

Bankers Trust Co. v. U. S., 299 F. 2d 936 (1962) 2

City Bank-Farmers Trust Co. v. U. S., 74 F. 2d 692 (1935) 5, 11, 14

Commissioner v. Sternberger, 348 U. S. 187 (1954) 8, 9, 10, 11, 12, 13, 15, 16, 18

Edwards v. Slocum, 264 U. S. 61 (1924) 8

Hoagland v. Kavanagh, 36 F. Supp. 875, E. D. Mich. (1941) 14

Humes v. U. S., 276 U. S. 487 (1928) 13

Ithaca Trust Co. v. U. S., 279 U. S. 151 (1929) ... 14

Turner v. Hassett, 55 F. Supp. 637, D. C. Mass. (1941) 14

U. S. v. Dean, 249 F. 2d 26 (1955) 9, 11, 12, 15, 16

U. S. v. Provident Trust Co., 291 U. S. 272 (1934) 4, 14

Wilkinson v. U. S., 365 U. S. 399 (1961) 8

PAGE

Statutes, Regulations, Treasury Ruling, and F. R. C. P:

Federal Rules of Civil Practice § 60 (b) 2, 8

Internal Revenue Code of 1954 § 2055 (a)
26 U. S. C. § 2055 (a) 4, 8

Internal Revenue Code of 1939 § 812 (d)
26 U. S. C. § 812 (d) 2, 3

Regulations 105, § 81.46 (a)
Fed. Reg. Feb. 25, 1942, Vol. 7, No. 38,
p. 1452 ..... 2, 3, 9, 10, 13, 14, 17, 18

Regs. 20-2055-2 (b)
T. D. 6296 ..... 4, 5, 8

Revenue Ruling 59-143
I. R. B. 1959-17, p. 13; 1959-1 C. B
247 ..... 4, 7, 11, 13, 14, 17

28 U. S. C.
Sec. 1254 (1) 2
Sec. 1346 (a) (1) 5

IN THE

Supreme Court of the United States

October Term, 1961

No.

BANKERS TRUST COMPANY and LEONARD M. WALLSTEIN, as Executors of the Will of CHARLES NEWMAN, Deceased,

Petitioners,

—VS—

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

To the Honorable The Chief Justice of the United States and the Associate Justices of the Supreme Court of the United States:

Petitioners (plaintiffs below) respectfully pray that a writ of certiorari issue to review the final judgment of the United States Court of Appeals for the Second Circuit dated March 9, 1961 affirming (a) the summary judgment entered December 30, 1960 by the United States District Court for the Southern District of New York dismissing the complaint on defendant's motion for summary judgment and denying plaintiffs' cross motion for summary judg-

ment, in an action for recovery of estate taxes claimed to have been erroneously collected and (b) the subsequent order of the District Court dated March 27, 1961 denying plaintiffs' motion under Fed. R. Civ. Proc. 60(b) for relief from the judgment of the District Court.

I. The opinion of the Court of Appeals is reported at 299 F. 2d 936 (1962) (Appendix A hereto). The opinion of the District Court, Palmieri, J., granting defendant's motion for summary judgment is reported at 190 F. Supp. 671 (1960) and in this record at 19a-31a;* its opinion denying plaintiffs' motion under Fed. R. Civ. Proc. 60 (b) is reported at 191 F. Supp. 792 (1961) and in this record at 46a-50a. Since the Court of Appeals affirmed on the opinions of the District Court, the latter are sometimes hereinafter referred to as the opinions of the Court of Appeals.

II. The judgment sought to be reviewed was dated and entered March 9, 1962.

III. The statutory provision which confers jurisdiction on this Court is 28 U. S. C. § 1254 (1).

IV. The questions presented for review are:

(a) Whether under the Internal Revenue Code of 1939, § 812(d) and Treas. Regs. 105, § 81.46(a), a bequest to charity is deductible for estate tax purposes, where such bequest is contingent upon failure of surviving issue to a woman whose chance of having living issue is statistically established at not more than from 46/1000th of 1% down to 26/1000th of 1%; or

(b) Whether such a bequest is deductible only upon a demonstration of *certainty* that the charity will

* Numerals followed by "a" refer to pages of the record.

take by proof that it is physically impossible for such woman to have issue by reason of surgery or disease.

V. The case involves the following statute:

Internal Revenue Code of 1939:

Sec. 812. NET ESTATE.

"For the purpose of the tax the value of the net estate shall be determined . . . by deducting from the value of the gross estate—

* * * * *

"(d) Transfers for Public, Charitable, and Religious Uses.—The amount of all bequests, legacies, devises, or transfers . . . to or for the use of any corporation organized and operated exclusively for religious, charitable, scientific, literary, or educational purposes. . . ."

The Treasury Regulation involved is Regs. 105 as follows:

"§ 81.46(a) (1942). Conditional bequests. (a) If as of the date of decedent's death the transfer to charity is dependent upon the performance of some act or the happening of a precedent event in order that it might become effective, no deduction is allowable unless the possibility that charity will not take is so remote as to be negligible. If an estate or interest has passed to or is vested in charity at the time of decedent's death and such right or interest would be defeated by the performance of some act or the happening of some event which appeared to have been highly improbable at the time of decedent's death, the deduction is allowable."

Also involved is Revenue Ruling 59-143 (I.R.B. 1959-17, p. 13), which is as follows:

> REVENUE RULING 59—143, I.R.B. 1959—17, p. 13.
>
> Advice has been requested whether a deduction is allowable under section 2055 of the Internal Revenue Code of 1954 for a charitable bequest contingent upon the failure of issue by decedent's daughters whose ages were 55 and 59 years, respectively, at the time of the decedent's death.
>
> A decedent, under the terms of her will, set up a trust in which the income is payable equally to her two daughters during their respective lives. Upon the death of the survivor the corpus of the trust is to be paid to the daughters' bodily issue then living. If there are no issue living at the death of the surviving daughter, the corpus is to be paid to *M* Association, a charitable corporation. At the time of decedent's death, one daughter was 59 years old and unmarried. The other daughter was 55 years old and married. Neither daughter had ever had any children.
>
> Section 2055 of the Code allows a deduction from the gross estate for Federal estate tax purposes of the amount of bequests to a charitable organization. Section 20.2055-2 (b) of the Estate Tax Regulations provide in part that the charitable deduction will be disallowed if, as of the date of decedent's death, a transfer for charitable purposes is dependent upon the performance of some act or the happening of a precedent event in order that it may become effective, unless the possibility that the charitable transfer will not become effective is so remote as to be negligible.
>
> For tax purposes the common law presumption that a woman can have children is rebuttable. See *United*

States v. Provident Trust Co., 291 U. S. 272. *According to the most recent United States Vital Statistics and Census data, the statistical probability that a woman aged 55 years and older will ever have bodily issue is remote.* In a case similar to that presented here, it was stated that the chances that a woman of 59 (who had never had issue) will have children are negligible and an "impossible contingency." See *City Bank Farmers Trust Co. v. United States*, 74 Fed. (2d) 692.

In view of the foregoing, it is held that the *statistical* probability of children being born to a woman, aged 55 years or older, is so remote as to be negligible. Accordingly, a deduction for the value of the remainder interest bequeathed to charity by the decedent is allowable under section 2055 of the Code. (Emphasis supplied).

VI. The basis for jurisdiction of the District Court is 28 U. S. C. § 1346(a)(1).

VII. The facts material to the consideration of the questions presented are as follows:

The testator, Charles Newman, bequeathed $46,000 to trustees under a revocable *inter vivos* trust, the same to be added to the corpus of that trust. Under that trust income was payable to decedent during his life and, after his death, to Mrs. Anne Marie Hughes during her life. On her death the principal was to be distributed to her issue who survived her and: "In default of issue of said Anne Marie Hughes then surviving," the principal was to be paid to a charitable corporation, bequests to which were deductible in determining Federal estate tax.

At testator's death the principal of the *inter vivos* trust was $37,116.46, to which the abovementioned bequest of $46,000 was added. Because the trust was revocable and because the settlor was the primary life beneficiary, the aggregate value of the original corpus and the bequest ($83,114.36) was included in the gross estate in the executors' estate tax return. However, since Mrs. Hughes had no issue at the testator's death and the testator's executors were advised that there was only an infinitesimal chance that she would thereafter have issue, they claimed a deduction, computed upon prescribed mortality tables applicable to Mrs. Hughes' life expectancy, in the amount of the present value of the remainder to charity. The Commissioner disallowed the deduction and estate tax (in the sum of $15,107.21) was exacted on the full amount of the conditional bequest to charity. Taxpaper duly filed a claim for a refund in that amount, which was rejected and thereupon this action was brought.

Further *undisputed* facts are the following:

At the date of testator's death, Mrs. Hughes was over 47 years of age, had been married for 17 years and had had no issue and to this date has had none (4a).

Applying established actuarial and statistical principles to official U. S. Census and Vital Statistics Reports, it is established that the possibility that such a woman as Mrs. Hughes, aged 47, married, with husband present, would ever bear a first child is not more than 46/1000th of 1%, or 46 chances in 100,000 (12a, 15a).

Furthermore, if Mrs. Hughes, volitionally moved thereunto, attempted immediately after the testator's death to have a child, she would be over 48 years old before the child

would be born. The chance of her then having issue would drop to .00026 or 26 chances in 100,000, or 26/1000ths of 1%. As the years passed the chance would rapidly decrease (38a, 40a). Moreover, the risks to mother and child would be prohibitive (10a, 17a).

All the foregoing results are reached by a method regularly and generally accepted as establishing statistical certainty, relied upon by business and the Government, and used by the Government in the familiar mortality tables upon which it customarily relies. When applied over a long period of years, the results reached show a consistently minute number of first births to women in the age group here involved (43a).

Further, the charitable remainder here would be defeated only if the child of such a birth survived its mother. When the chance of such survival is taken into account, the possibility that the remainder will be defeated is even smaller than the very slight chance of first birth. For all practical purposes, the possibility is reduced to zero (18a).

In the undisputed opinion of one of the world's leading obstetricians and gynecologists, the chance that any childless woman of 47 would have a living first child is *nil* (10a).

Both sides below moved for summary judgment. Petitioners' motion was denied and the Government's motion granted.

Petitioners had argued that remoteness of the possibility of issue could be shown by statistics based on experience and in support of that *principle*, had cited *inter alia*, Rev. Rul. 59-143.

Referring to that Ruling, the District Court stated, in its opinion on the motion for summary judgment, that "Significantly the Department of Commerce statistics (mentioned in the Ruling) showed *no* births to women of 55 years and over" (22a—emphasis supplied). The fact was, however, that, on the contrary, according to the latest available Department of Commerce statistics, there had in fact been births to women of 55 and over. The Revenue Ruling accepted such statistics as establishing the remote possibility of bodily issue and allowed the charity deduction. Presenting those facts, the petitioners moved for relief under F. R. C. P. 60 (b). The motion was denied.

VIII. The reasons for the allowance of the writ are:

A. The specific question of federal law here involved is important and has not been, but should be, settled by this Court.

B. The issue here involved is one of wide public interest. The national public policy is to encourage testamentary gifts to charity by permitting the amount thereof to be deducted from a testator's gross estate, *Edwards* v. *Slocum*, 264 U. S. 61, 63 (1924). The same public policy attaches also to *contingent* gifts to charity where there is a high probability that charity will take. Moreover, the question here would also arise under current law [1954 Code, § 2055 (a) (2); Regs. 20.20 55-2 (b)].

C. The opinions below in several aspects misconceived the meaning of this Court's decision in *Commissioner* v. *Estate of Sternberger*, 348 U. S. 187 (1954), which it found controlling. *Wilkinson* v. *U. S.*, 365 U. S. 399 (1961).

Moreover, in such misconceptions, the court below is in conflict with the Court of Appeals of the First Circuit in *U. S.* v. *Dean*, 249 F. 2d 26 (1955).

(1) The first misconception lies in the view of the courts below that *Sternberger* requires the holding that a charity bequest, contingent upon absence of issue, is not deductible without proof of *certainty* that charity will take based upon proof of *certainty* that there will be no issue.

But *Sternberger* dealt with a bequest to charity conditioned on several events, one of which was that testator's daughter, aged 27, would die without issue. In that relation this Court pointed out: "Respondent concedes that the chance that charity will not take is much more than negligible. Therefore, if § 81.46 (a) applies to the instant case, no charitable deduction is permissible" (348 U. S. at p. 194). The sole question actually litigated was whether *upon that concession*, there was authority under Reg. 105, § 81.44 for fragmenting the bequest to charity and deducting the present value of so much thereof as might go to charity. For reasons not here relevant this Court held in the negative.

In the course of its opinion this Court wrote:

> "The predecessor of § 81.46 confined charitable deductions to outright, unconditional bequests to charity. It expressly excluded deductions for bequests that might never reach charity. . . . Subsequent amendments have clarified and not changed that principle. Section 81.46 (a) today yields to no condition unless the possibility that charity will not take is 'negligible' or 'highly improbable.'" 348 U. S. at p. 194

The passage expressly states that under the earlier regulation charitable deductions were permissible only in cases of outright, *unconditional* bequests to charity. However, it further states that § 81.46 (a) permits such deductions where the bequest is *contingent* but the possibility that charity will not take is negligible or highly improbable.

This passage was quoted in the opinion below (24a) and, we submit, was misunderstood by the courts below.

As to a woman of 27, the effect of the newer regulation was no different from that of the older one. Under both there was no basis for a charity deduction. However, the courts below apparently thought that this Court's statement with reference to a woman of 27, concededly capable of child bearing, was controlling as to the woman here of 47, whose chance of issue was 46/1000th of one percent. Accordingly they deduced from the passage in *Sternberger* the proposition that "the current Regulations do not enlarge to any appreciable extent the situation in which, under the more restrictive language of the earlier Regulations, conditional bequests to charity were permitted" (25a).

The courts below further inferred from the passage in *Sternberger* "the principle of general application that deduction is appropriate when the charity 'is sure to take' but not when the 'condition is such that the charity may not take at all' " (23a), regardless of how remote and negligible the chance thereof may be.

Finally, the courts below denied the deduction for lack of "evidence of poor health or incapacity (to have issue) due to surgery or natural causes" (25a-26a, 46a)—i.e., for lack of proof of the *certainty* of physical impossibility to have issue.

Disregarding the factual basis of the remarks in *Sternberger*, the courts below gave them an all-inclusive application, which is directly negated by the clear language of § 81.46(a). The Treasury has there unequivocally stated that the vesting in charity need not be *sure*, but may be subject to a chance, the happening of which is negligible or highly improbable. The distinction is clear; it is between *absolute certainty* and *high improbability*.

It appears that the opinions below recognized that distinction, but considered themselves bound by the quoted passage in *Sternberger* as they misconceived it. Thus, in footnote 9 (29a), the opinions below cited *City Bank Farmers Trust Co.* v. *U. S.*, 74 F. 2d 692 (2d Cir. 1935) and Rev. Rul. 59-143 as establishing the proposition that the old presumption that all women of whatever age could bear children is rebutted where [the] woman is beyond the age of reasonable *likelihood of child birth*" (emphasis supplied). Such absence of "reasonable likelihood", of course, cannot be determined by speculation or judged *in vacuo*. We shall later show by authority that it can be demonstrated by experience as embodied in Government statistics.

We submit, therefore, that, correctly read, *Sternberger* does not require *certainty* that charity will take, but only a *remote chance* that it will *not* take—a *principle* which the Treasury itself applied in Rev. Rul. 59-143.

(2) The decision of the courts below that, notwithstanding § 81.46 (a), *Sternberger* requires *certainty* is in conflict with the decision of the First Circuit in *U. S.* v. *Dean*, 224 F. 2d 26 (1955). In the opinion there, referring to the very same passage in *Sternberger* quoted by the courts below, the First Circuit wrote:

> "The Government, placing heavy reliance upon certain statements in the opinion of the Supreme Court in the recent case of Commissioner of Internal Revenue v. Sternberger's Estate, * * * contends that the District Court misconstrued § 81.46 of Treasury Regulations 105. Its argument in substance is that § 81.46 as construed by the Supreme Court in the Sternberger case permits a deduction on account of a bequest to charity only when as a practical matter there is no possibility whatever that charity will not eventually take the bequest" (224 F. 2d at p. 27).

The First Circuit then continued:

> "We do not agree for the reason that the pertinent section of the regulations does not say that the deduction must be disallowed unless there is no practical possibility that charity will not take; it says instead that 'no deduction is allowable unless the possibility that charity will not take is so remote as to be negligible,' and we do not think the Supreme Court in Sternberger intended to imply that the section does not mean what it says" (pp. 27-28).

After outlining the question in *Sternberger* and referring to this Court's reversal there, the First Circuit said:

> "In doing so it (the Supreme Court) used some language tending *out of context* to support the government's basic contention. ***But it did not rest its reversal on the broad proposition that charitable bequests which at the decedent's death are not assured*** but are in fact conditional are never deductible" (224 F. 2d, at p. 28, emphasis supplied).

(3) The opinions below further misconceived the decision of this Court in *Sternberger* in their holding that that case compelled the conclusion that the undisputed statistics

here are insufficient to establish the remote possibility of issue to Mrs. Hughes.

At the outset we note that in *Sternberger* the sufficiency of statistics was *not* considered in relation to the probability of issue to the life tenant. That question was there eliminated by the *concession* that such issue was in that case quite likely. The consideration of statistics was solely upon the question of the *valuation* of the portion of the remainder that might nevertheless go to charity. No question of valuation is involved in the instant case. The courts below expressly so stated (21a).

Moreover, in *Sternberger* this Court expressly pointed out (348 U. S. at p. 196) that the bequest to charity was contingent not only on the failure of issue to decedent's 27 year old daughter, but also on whether she would survive her mother and whether, having been divorced at the time of decedent's death, she would remarry, and having remarried, would have issue which would survive her. With that complexity of multifarious contingencies—unlike the simple single contingency here—this Court found statistics useless—just as it did in *Humes* v. *U. S.*, 276 U. S. 487 (1928).

Again, in their rejection of statistics "without more" (26a)—i.e., without evidence of poor health or incapacity due to surgery or natural causes (25a, 46a), the courts below disregarded the Treasury's own enunciation of the *principle* governing the application of § 81.46(a). In Rev. Rul. 59-143 there is not the slightest reference to physical incapacity. The sole basis of the Ruling was the showing of statistics.

Further, in rejecting the test of statistical experience, the courts below ignored the history of §81.46(a). That

section owes its origin to *Ithaca Trust Co.* v. *U. S.*, 279 U. S. 151 (1929) and to *City Bank Farmers Trust Co.* v. *U. S.*, 74 F. 2d 692 (1935). The former permitted the deduction where the vesting in charity was subject to "no uncertainty greater than the general uncertainty that attends human affairs" (at p. 154). The latter approved the determination of the degree of such uncertainty by the use of statistics. Subsequently § 81.46 (a) resolved the conflict between *City Bank* and such cases as *Hoagland* v. *Kavanagh*,* 36 F. Supp. 875, E. D. Mich. (1941) and *Turner* v. *Hassett*, 55 F. Supp. 637, D. C. Mass. (1941), all of which had been decided *before* the promulgation of § 81.46(a) in 1942. Finally Rev. Rul. 59-143 applies the principle of the new Regulation (§ 81.46(a)).

We believe that, viewed in retrospect, § 81.46 (a) is but a further liberalization of earlier doctrine. This Court in *U. S.* v. *Provident Trust Co.*, 291 U. S. 272 (1934) demolished the ancient rule that all women, no matter how old, could bear children. It held that the "practical" inability to do so is a fact that must be recognized, but it did *not* hold, as the opinions below assumed, that physical incapacity was an essential fact (26a, 46a and note 2 to the opinion below denying the motion for relief—49a). § 81.46 (a) went a step further and prescribes that recognition must be given to *any* fact (not only physical disability, as by reason of menopause) which shows the unlikelihood of birth. And, finally, Rev. Rul. 59-143, with no slightest mention of physical incapacity, establishes the principle that the negligible chance of issue may be demonstrated by the statistical result of experience.

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* It is noteworthy that the opinion below conceded that "it may be" that that case (Hoagland) "would bear re-examination in the light of the 'clarifying amendment'" (Fn. 15, 30a).

We believe, further, that it was only the misconception of *Sternberger* which could have led to the statements in the opinion here that "It is impossible to calculate with *certainty* the extent of that limited chance (of issue)" (emphasis supplied) and that "Where, as here, there has been no evidence of poor health or incapacity due to surgery or natural causes—statistical data is insufficient to meet the requirements of § 81.46 (a)" (25a).

(4) In the misconception of *Sternberger* as rejecting statistics to measure the possibility of issue, the courts below were again in conflict with the First Circuit. That court recognized the truth of the axiom that the best way to estimate future probability is by past experience. In *United States* v. *Dean*, 224 F. 2d, at p. 29, that court wrote:

> "• • • the chance that charity will take can be accurately computed by the application of recognized principles of the actuarial art to generally accepted statistical data."

Dean, moreover, expressly rejected the view here below that *Sternberger* adjudicated the unavailability of statistics to measure probability. Referring to the aforementioned complexity of the contingency in *Sternberger*, the First Circuit noted that the remarks of this Court with reference to statistics were based "on the ground that the actuarial art was unable to cope with the *contingency of that particular case*" (224 F. 2d, at p. 28, emphasis supplied).

(5) A further misconception of *Sternberger* by the courts below was with reference to the asserted distorting effect of volition to have issue. By concession, the 27 year old

daughter could be expected safely to have issue. Here, in contrast, the uncontradicted statistical and medical evidence shows that Mrs. Hughes, at her age, no matter what the inducement or her volition, would have only an infinitesimal chance of having issue and that the attempt so to do would probably be fatal both to mother and child (10a, 17a). That undisputed feature of this case the courts below disregarded, again in conflict with *Dean*, where the First Circuit wrote:

> "In this case the chance that charity will benefit depends entirely upon the relative longevity of three persons, a matter unaffected by volition or personal inducement, for it would be preposterous to assume that either the daughter or the daughter-in-law or both, would choose to commit suicide in order to defeat the decedent's bequest to charity" (224 Fed. 2d at p. 28).

The possibly distorting effect of volition in a particular case depends upon the freedom in such case to exercise it. There was such freedom in *Sternberger;* here there was not.

Further, we submit that any element of volition to have issue is reflected in the codification of experience shown by the statistics of birth published by the United States Government. Certainly it cannot be assumed that it was accident only or contrary volition which was reflected in the statistics there shown.

(6) Finally, the courts below gave unwarranted heed to the administrative decision herein (25a, 48a). The First Circuit in *Dean* held that after determination of the actu-

arial chance that charity would not take, the question whether that chance is negligible or highly improbable must be determined in each case as a matter of law (224 F. 2d, at p. 29).

Moreover, the administrative disposition in a particular case certainly may not disregard a Treasury Regulation [§ 81.46(a)] especially where the principle to be applied in the administration of that regulation has been fixed by a Treasury Department Ruling (59-143) of general application.

Again, even if an administrative disposition in a given case is entitled to weight where it appears reasonable, it has no such weight where it holds that a chance of 46/1000 of 1% down to 26/1000 of 1% does not show that such chance is so remote as to be negligible.

Conclusion

Though we are fully aware of this Court's infrequent grant of the writ, we respectfully submit that for all the foregoing reasons the petition for a writ of certiorari should here be granted. In *Sternberger* the writ was granted because of a conflict between the First and Second Circuits on one aspect of the meaning and effect of § 81.46. So here, we submit, the misconceptions of *Sternberger* by the courts below and the conflict between their views and those of the First Circuit on another aspect of the same § 81.46 demonstrate that the writ should be granted. In both aspects the final determination of the questions involved are in highest degree necessary to the general pub-

lic interest and to the uniform administration of the Revenue Laws.

New York, N. Y.
May 28, 1962

Respectfully submitted,

LEONARD M. WALLSTEIN, JR.
Attorney for Petitioners

LEONARD M. WALLSTEIN
BENJAMIN MENSCHEL
Of Counsel

APPENDIX A

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

No. 260—September Term, 1961.

(Argued March 9, 1962 Decided March 9, 1962.)

Docket No. 26899

BANKERS TRUST COMPANY and LEONARD M. WALLSTEIN, as Executors of the Will of Charles Newman, Deceased,

Plaintiffs-Appellants,

—v—

UNITED STATES OF AMERICA,

Defendant-Appellee.

Before:

WATERMAN, KAUFMAN and MARSHALL,

Circuit Judges.

The executors of the estate of Charles Newman seek reversal of a judgment dismissing their complaint wherein they seek recovery of estate taxes allegedly erroneously paid.

Affirmed on the opinion below, United States District Court for the Southern District of New York, Palmieri, J.,

reported at 190 F. Supp. 671; (1960). An order denying a motion under Fed. R. Civ. P. 60(b) for relief from the judgment is also affirmed on the opinion of Judge Palmieri, reported at 191 F. Supp. 792 (SDNY 1961).

WALLSTEIN, MENSCHEL & WALLSTEIN (Leonard Wallstein, Jr., of counsel), New York City, for Plaintiffs-Appellants.

ROBERT M. MORGENTHAU, United States Attorney, Southern District of New York (Robert Arum, Vincent L. Broderick, David Klingsberg, Asst. United States Attorneys, of counsel), for Defendant-Appellee.

PER CURIAM:

Plaintiffs, as executors of the Estate of Charles Newman, appeal from a summary judgment granted by the court below, dismissing plaintiffs' complaint in an action for the recovery of estate taxes claimed to have been erroneously collected, and also appeal from a subsequent order of the same court denying plaintiffs' motion under Fed. R. Civ. Proc. 60(b) for relief from that judgment.

The district court judgment and the subsequent order denying relief therefrom are affirmed on the studiously reasoned opinions of Judge Palmieri below, 190 F. Supp. 671 (SDNY 1960), and 191 F. Supp. 792 (SDNY 1961).

INDEX

	Page
Opinions below	1
Jurisdiction	2
Question presented	2
Statute and regulations involved	2
Statement	3
Argument	4
Conclusion	8

CITATIONS

Cases:

Commissioner v. Sternberger's Estate, 348 U.S. 187	5, 6, 7
Hulbert's Will, In re, 213 N.Y.S. 2d 385	7
Ithaca Trust Co. v. United States, 279 U.S. 151	5
Lynde's Estate, In re, 211 N.Y.S. 2d 493	5
Ward's Will, In re, 9 App. Div. 2d 950, 195 N.Y.S. 2d 933, affirmed, 9 N.Y. 2d 722	7
United States v. *Dean*, 224 F. 2d 26	5, 6

Statute:

Internal Revenue Code of 1939, Sec. 812(d) (26 U.S.C. 1952 ed., Sec. 812)	2, 4, 5

Miscellaneous:

Treasury Regulations 105, Sec. 81.46	3, 4, 5

In the Supreme Court of the United States

OCTOBER TERM, 1962

No. 151

BANKERS TRUST COMPANY and LEONARD M. WALLSTEIN, as Executors of the Will of CHARLES NEWMAN, Deceased, PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINIONS BELOW

The opinions of the district court on motion for summary judgment (R. 19a-31a)[1] and on motion for relief from judgment (R. 46a-50a) are reported at 190 F. Supp. 671 and 191 F. Supp. 792, respectively. The opinion of the court of appeals (Pet. 19-20) is reported at 299 F. 2d 936.

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[1] "R." references are to the appendix to the petitioners' brief filed in the court of appeals.

JURISDICTION

The judgment of the court of appeals was entered on March 9, 1962. (Pet. 19.) The petition for a writ of certiorari was filed on June 1, 1962. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether, in determining the net estate for federal estate tax purposes, a deduction is allowable under Section 812(d) of the Internal Revenue Code of 1939, for a bequest of a charitable remainder which is to take effect only in the event that a childless 47-year old woman, the life beneficiary, does not leave surviving issue.

STATUTE AND REGULATIONS INVOLVED

Internal Revenue Code of 1939 (26 U.S.C., 1952 ed.):

> SEC. 812. NET ESTATE.
>
> For the purpose of the tax the value of the net estate shall be determined, in the case of a citizen or resident of the United States by deducting from the value of the gross estate—
>
> * * * *
>
> (d) *Transfers for Public, Charitable, and Religious Uses.*—The amount of all bequests, legacies, devises, or transfers * * * to or for the use of any corporation organized and operated exclusively for religious, charitable, scientific, literary or educational purposes * * *.
>
> * * * *

Treasury Regulations 105 (1939 Code):

> Sec. 81.46. *Conditional bequests.*—If as of the date of decedent's death the transfer to charity is dependent upon the performance of some act or the happening of a precedent event in order that it might become effective, no deduction is allowable unless the possibility that charity will not take is so remote as to be negligible. If an estate or interest has passed to or is vested in charity at the time of decedent's death and such right or interest would be defeated by the performance of some act or the happening of some event which appeared to have been highly improbable at the time of decedent's death, the deduction is allowable.

* * * *

STATEMENT

Charles Newman died on October 26, 1950, leaving some $83,000 in trust,[2] the income to be paid to Anne Marie Hughes for life and the corpus then to be distributed "to and among the issue of said Anne Marie Hughes, her surviving" or, if none, to an exempt charitable organization. (R. 19a.)

Anne Marie Hughes had been the testator's devoted private secretary for the 30 years preceding his death. She was 47 years of age at the time of the testator's death on October 26, 1950. She had been married for 17 years and was childless. Mrs. Hughes stated,

---

[2] The trust had been created *inter vivos*, but was includible in the decedent's gross estate because he had retained a life interest and a power to revoke. His will made an addition to the existing trust.

in her deposition, that on October 26, 1950, neither she nor her husband was aware of any physical impediment which might have prevented her from bearing children. (R. 19a.)

The executors included the principal of the trust in the decedent's gross estate but claimed a deduction under Section 812(d) of the Internal Revenue Code of 1939 for the value of the remainder after Mrs. Hughes' life as a gift to charity. The Commissioner disallowed the deduction and the executors, having paid the resulting deficiency, in due course brought this suit for refund. (R. 19a-20a, 27a.)

The district court granted summary judgment for the government, holding that the deduction could not be allowed because the chance that the charity might not receive the contingent remainder of the trust was not "so remote as to be negligible" within the meaning of Treasury Regulations 105, Section 81.46. (R. 25a-26a.) In denying petitioners' motion for relief from judgment, the court noted that, in their effort to prove a remote possibility, petitioners had failed to demonstrate that the statistical data offered by them was not reasonably subject to "the distorting effect * * * of the volitional element and the possible inducement to have progeny." (R. 48a.) The court of appeals affirmed, *per curiam*, "on the studiously reasoned opinions of Judge Palmieri below." (Pet. 20.)

ARGUMENT

The courts below applied settled legal standards, no conflict of decisions exists, and there is no other ground justifying further examination by this Court.

1. A deduction for a contingent bequest to charity is allowable under Section 812(d) of the Internal Revenue Code of 1939 and Treasury Regulations 105, Section 81.46, *supra*, p. , only if the possibility of the charity not taking "is so remote as to be negligible." The uncertainties normally engendered by a precedent event preclude deduction unless they are so improbable that, for all practical purposes, they may be disregarded. *United States* v. *Dean*, 224 F. 2d 26, 29 (C.A. 1st). Any element of individual volition which may affect the probability of the precedent event occurring must be taken into account (*Commissioner* v. *Sternberger's Estate*, 348 U.S. 187), since individual motivations create uncertainties "appreciably greater than the general uncertainty that attends human affairs" (*Ithaca Trust Co.* v. *United States*, 279 U.S. 151, 154). This is especially true where there exists an inducement to fulfill the conditions of the precedent event in order to receive the full benefit of the bequest and thus defeat the charitable gift.

Petitioners relied exclusively upon statistical data in attempting to prove the remoteness of the possibility that Mrs. Hughes might leave a surviving issue and thereby defeat the contingent gift to charity. The district court, while accepting the relevance of such data, held that recognition must also be given "to the distorting effect upon the statistical data of the volitional element and the possible inducement to have progeny." (R. 26a.) Mrs. Hughes' testimony indicated that there existed no known physical

impediment, and that prior to decedent's death she had not wanted to leave his employ in order to raise a child. (R. 5a.) On that basis, the district court correctly concluded that the evidence did not demonstrate that Mrs. Hughes' chances of leaving surviving issue were so remote as to be negligible.

2. Petitioners' assertion that the courts below misapplied the legal principle set forth in the *Sternberger* case by demanding certainty that the charity would receive the bequest (Pet. 8-11, 12-16) is without merit. The district court explicitly rejected any requirement of absolute certainty that the charity will take by saying (R. 21a-22a):

> However, plaintiff's failure to rebut the existence of the bare physical possibility of issue is not necessarily fatal to their claim. For, under the applicable Regulations, the test is whether the possibility, assuming that it did exist, was "so remote as to be negligible."

3. Finally, petitioners assert a conflict with *United States* v. *Dean*, *supra*, on the usage of the statistical data. In *Dean*, only the question of longevity—life taking its natural course—was involved. There was no possibility of individual volition (except for suicide, which the court declined to consider) interacting to defeat the charitable bequest. Indeed, the Court of Appeals for the First Circuit there articulated the distinction between *Dean* and the present case (224 F. 2d., p. 28):

> In the present situation, then, *statistical data is not subject to distortion by any individual's self-interest*, and since mortality tables are generally

> recognized as reliable and have long been used in the courts in tax and other cases, it follows that recognized principles of the actuarial art can safely be relied upon to cope with the contingency that charity will take in this particular case. [Emphasis supplied.]

In the *Sternberger* case, this Court made it clear that statistical data was "less dependable" where the controlling event could be affected by individual volition. *Commissioner* v. *Sternberger's Estate*, 348 U.S. 187, 198.

In view of its holding that the more than negligible possibility of natural children surviving Mrs. Hughes defeated the claimed deduction, the district court did not find it necessary to consider at length the government's alternative position that the term "issue" as used in the trust indenture included, under New York law, an adopted child. (R. 26a.) Subsequent decisions of the New York courts have held that the term "issue" includes a child adopted after the testator's death. *In re Hulbert's Will*, 213 N.Y.S. 2d 385 (1961); *In re Lynde's Estate*, 211 N.Y.S. 2d 493 (1961); *In re Ward's Will*, 9 App. Div. 2d 950, 195 N.Y.S. 2d 933, affirmed, 9 N.Y. 2d 722 (1961).

CONCLUSION

For the reasons stated, the petition for a writ of certiorari should be denied.

Respectfully submitted,

ARCHIBALD COX,
Solicitor General.

LOUIS F. OBERDORFER,
Assistant Attorney General.

JOHN B. JONES, JR.,
CHARLES B. E. FREEMAN,
Attorneys.

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—vs.—

UNITED STATES OF AMERICA,
Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

REPLY BRIEF OF PETITIONERS

LEONARD M. WALLSTEIN, JR.
Attorney for Petitioners
233 Broadway
New York 7, N. Y.

LEONARD M. WALLSTEIN
BENJAMIN MENSCHEL
Of Counsel

INDEX

PAGE

Argument 1

Conclusion 4

CITATIONS

Cases

Commissioner v. Sternberger, 348 U. S. 187 ..... 1, 2, 3

Rick's Estate, 12 App. Div. 2d 395; affd. 11 N. Y. 2d 231 4

United States v. Dean, 249 F. 2d 26 ..... 1-2, 3, 4

Miscellaneous

Revenue Ruling 59-143 3

Treasury Regulations § 81.46 ..... 3, 4

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REPLY BRIEF OF PETITIONERS

1. Defendant seeks to sustain the decision below upon the ground, stated in the opinion below, that a remote possibility of issue is not shown by a 46/100,000 or lesser chance of issue "without more" (26a, 46a)—i.e. physical incapacity. This insistence upon physical incapacity is apparently predicated upon the assumption that Mrs. Hughes' volition to have a child might nullify the demonstration of statistics. There is no justification in authority or principle for such insistence.

In *Commissioner* v. *Sternberger*, 348 U. S. 187 (1955), because the 27 year old woman there concerned was concededly capable of having a child, her possible volition so to do was clearly capable of fulfillment. In *U. S.* v. *Dean*, 224

F. 2d 26 (1st Cir. 1955) the court, in referring to the point of volition in *Sternberger*, expressly emphasized that the life tenant there was "a 27 year old woman" (at p. 28). So far as concerns the matter of volition here, the record shows and defendant concedes (Brief, p. 6) that up to the time of testator's death, including the period during which she might have borne a child, Mrs. Hughes did not wish to have one. After his death, when she was 47, even if her wish changed, the chance of fulfilling it would be 46/1000th of 1% or less and any attempt so to do would be suicidal (10a), a factor which, as defendant indicates (Brief, p. 6) the court will decline to consider in assessing the measure of improbability or the reverse.

2. The opinion below concedes that "it is reasonable to conclude . . . that at age 47, the chance that a woman will bear issue for the first time, thereby defeating the remainder interest which would otherwise go to charity, is *limited*" (25a, emphasis supplied). A forty-six thousandths of one percent chance is, indeed, limited. Clearly, however, the courts below did not consider that negligible chance sufficient because it did not amount to positive, absolute *certainty* or, as the opinion put it, the taking by charity was not "sufficiently certain" (20a). What but an insistence upon certainty, as opposed to all but a negligible chance of failure, could explain the requirement below that in addition to the negligible chance of issue, there must be proof of the *impossibility* thereof "due to poor health or incapacity due to surgery or natural causes" (25a) for otherwise, said the opinion, there was "a physical possibility that the charity remainder might be defeated" (21a). Therefore, again, "it was reasonable to require plaintiff to come forward with some evidence bearing on

this particular case tending to show either the life tenant's poor health or her incapacity to bear issue due to surgery or other causes" (46a). Finally, the lower courts' position was summarized in the statement that "the principle of general application [is] that deduction is appropriate where the charity is 'sure to take' but not when 'the condition is such that charity may not take at all'" (23a).

Clearly defendant's brief is wrong when it states that "the district court explicitly rejected any requirement of absolute certainty" (p. 6) The quotation there given from the opinion was but a paraphrase of § 81.46, which the opinion thereafter studiously proceeded to negate. What can "physical incapacity" or "sure to take" mean except *certainty?*

The courts below exacted *certainty* and that exaction was due to the misreading of a passage in the opinion in *Sternberger* taken out of context, just as the Government was shown to have done by the First Circuit Court of Appeals in *Dean.* We submit that if the lower courts here were right, § 81.46 is a dead letter and so is the Treasury Department's own construction of it in Rev. Rul. 59-143.

3. That *Dean* involved the question of longevity does not affect the fact that it conflicts with the decision here below. Both *Dean* and the instant case turned on the common questions (1) of the correct construction of § 81.46, (2) of the meaning and effect of the passage in the *Sternberger* opinion upon which the result below was based and (3) of the controlling effect of statistics in determining the extent of the chance that charity would not take. Upon all those fundamental points the cases are in direct conflict.

If the decision here was correct no contingent bequest to charity is deductible unless, despite § 81.46, the contingency

is purely verbal and the taking by charity is as certain as if there were no mention of contingency. If *Dean* is correct the deduction is permissible under § 81.46 if experience, embodied in government statistics, shows the charity will take except for a negligible chance to the contrary.

4. Defendant's brief (footnote, p. 7) is incomplete and, therefore, wrong in asserting that the New York law holds that the term "issue" includes a child adopted after the testator's death. The very recent decision of the New York Court of Appeals in *Rick's Trust*, 12 App. Div. 2d 395 (March 16, 1961); affd 10 N. Y. 2d 231 (July 7, 1961) clearly reiterates the rule of New York that a child, adopted after the testator's death, is not included in the term "issue" unless there is independent affirmative evidence that the testator so intended. There is here not the slightest such evidence.

CONCLUSION

We submit, therefore, that for the reasons stated in our petition and this reply brief the petition should be granted.

Respectfully submited,

LEONARD M. WALLSTEIN, JR.
Attorney for Petitioners
233 Broadway
New York 7, N. Y.

New York, N. Y.
July, 1962.

LEONARD M. WALLSTEIN
BENJAMIN MENSCHEL
Of Counsel